No. 95-1175

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOSE R. BRAVO, JAMES G. HUTTO,
RICHARD D. LICHTERMANN, GROVER N. LIPE, JR.,
MARK S. LOMBARDO, EDWARD A. LYONS,
and STEVEN R. OLIVER,

Petitioners,

v.

NATIONAL MEDIATION BOARD and AIR LINE
PILOTS ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' BRIEF IN REPLY TO BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION

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INTRODUCTION

Petitioners Jose R. Bravo *et alia* hereby reply to the Brief in Opposition of Respondent Air Line Pilots Association ("ALPA Br").

ARGUMENT

ALPA's arguments do not refute the contentions set out in the Petition, but instead highlight why review is necessary here.

I. The Railway Labor Act does *not* "leave[ ] it entirely up to the [respondent National Mediation] Board * * * to determine what constitutes a 'majority'." *Pace* ALPA Br at 4. A "majority" is a fixed concept: *viz.*, one more than one half of the employees eligible to vote in the election. *See* Petition at 10. The Board may not determine that a self-evident *minority* is a "majority"—*e.g.*, that only two votes for representation out of two thousand votes cast constitute a "majority".

In this case, the Board has used its "majority-of-the-majority" rule and a ballot which scientific investigation, including controlled experiments, has proven incompetent to determine a "majority".[1] The Board's use of a scientifically incompetent rule and ballot is no different in principle from its arbitrarily treating two votes out of two thousand as a "majority". If the courts have no jurisdiction to hear this case, then logically they also lack power to prevent the Board from determining a "majority" in any way it pleases. Then what purpose was served by Congress' specifying that a "majority" of employees has the right to determine union representation?

Petitioners' claims are not mere arguments "'of policy and broad generalities as to what the Railway Labor Act should provide'". *Pace* ALPA Br at 5. The Act mandates a *majority* choice among all employees eligible to vote—which ALPA does not deny. The Board's voting-rule and ballot are incompetent to determine the majority's choice—which must be taken as true here. Thus, rather than debating what the Act "*should* provide", petitioners are seeking to compel the Board to use rational election-procedures to ensure that the pilots at Federal Express receive the right the Act *does* guarantee.

ALPA does not—nor could it—explain how the knowing use by the Board of an election-rule and ballot that do *not* determine the will of the majority of employees is not a

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[1] At this stage in the proceedings, petitioners' allegations and supporting proofs must be taken as true. *See* Petition at 7-9 & n.6.

"gross violation" of the Act. Given that all the mechanisms of the Act for collective bargaining come into play only after a union has been selected as the representative, and given that this selection explicitly turns on the *majority's* choice, intentional participation by the Board in certification of a *minority's* choice must be the very apogee of illegality.

II. Petitioners do *not* "concede" that "opponents of union representation have no constitutional right to refuse exclusive representation". *Pace* ALPA Br at 5. To the contrary: Petitioners contend that *exclusive* representation by a *minority* union violates their rights under the First and Fifth Amendments. And *this Court has never held that exclusive representation by a minority union is constitutional.*[2]

That thirty years ago this Court *assumed* that the Board's ballot might favor employees opposing representation emphasizes why review is needed here. *BRAC* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965), *discussed in* Petition at 15. The Court's *assumption* licensed the Board to use the ballot thereafter. But Petitioners' scientific evidence (which must be taken as true) now proves the Court's assumption *wrong*. Appendix to Petition at 192a, ¶ (c). Thus, this Court, not the Board, has a peculiarly intense responsibility to stop continued use of a ballot proven to be

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[2] *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956), and *Machinists* v. *Street*, 367 U.S. 740 (1961), did not address exclusive representation at all. And *Ellis* v. *BRAC*, 466 U.S. 435, 455 (1984), held that certain expenditures by an exclusive representative under an "agency-shop" arrangement *could* violate the First-Amendment rights of nonunion employees. *Pace* ALPA Br at 5. *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), declared exclusive representation *un*constitutional in a statute passed under the Commerce Clause. And *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), did not follow *Carter* only because the Court construed the National Labor Relations Act as *not* providing for *exclusive* representation. *Contrast* ALPA Br at 7 n.4 *with* Petition at 21-23. The only case in which this Court ever upheld any form of exclusive representation involved a public-sector, not a Commerce-Clause statute, *and raised no claim that the union did not enjoy majority status. Knight* v. *Minnesota Community College Faculty Ass'n*, 460 U.S. 1048 (1983), *aff'g* 571 F. Supp. 1 (D. Minn. 1982). *See* Petition at 22 n.17.

grossly biased against the very employees the Court once erroneously assumed it favored.

That the Board may use one or another arguably valid presumption in its election-procedures is no defense. *Pace* ALPA Br at 6-7. This is not a case in which the Board has used the presumption that non-voters assent to the will of the majority of those voting, and a nonbiased ballot reflecting that presumption. It is even not a case in which the Board has used merely the presumption that non-voters should be counted as voting against representation, and a nonbiased ballot reflecting that presumption. This is a case in which—besides using a ballot scientifically proven to be *biased*—the Board has irrebuttably presumed that an employee voting for union *X* should be treated as wanting representation *in the abstract*, such that his vote for union *X* should also be counted for union *Y* in determining whether *Y* should be certified as the representative.[3] This Court has never held such an irrebuttable, nonrational presumption valid, especially when used in conjunction with a biased ballot.

CONCLUSION

That exclusive representation infringes on nonunion employees' freedom of nonassociation is self-evident. Whether exclusive representation is constitutional when a majority of

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[3] This is what ALPA means when it praises the Board for "impos[ing] a threshold requirement that an outright majority vote in favor of representation". ALPA Br at 6 n.3. The view of a majority as to "representation" in the abstract is not the issue, however. Rather, the employees are entitled to a majority vote on a *particular* union. *See* Railway Labor Act § 2, Fourth (emphasis supplied): "[t]he *majority* of any craft or class of employees shall * * * determine *who* shall be the representative". 45 U.S.C. § 152, Fourth. "*WHO* shall be the representative", not merely whether there shall be *some* representative. As occurred in this case, the Board's "majority-of-the-majority" rule determines only whether a majority has voted for *some* representative, and then irrebuttably presumes that the votes for union *X* (the "minority of the majority") should be imputed to union *Y* (the "majority of the majority")—resulting in the certification of an actual *minority* representative. *See* Petition at 5-6.

employees chooses the representative, it cannot possibly be so when only a minority makes that choice, unless every shred of concern for democratic fairness be set aside. The Railway Labor Act implicitly recognizes this, when it mandates that "[t]he *majority* of any craft or class of employees shall * * * determine who shall be the representative".[4] If ALPA is correct, however, the Act's command collapses into impotent blather, because the Board knowingly and intentionally may certify a union as the supposed "majority" representative by whatever procedure it likes—and no court may question that procedure, no matter how scientifically wrong, nonrational, or even preposterous it is.

This takes to a new nadir the question "What is truth?", with the answer: *nothing*. Facts and scientific experiments count for *nothing*. The duty of the courts to protect individuals' rights counts for *nothing*. The mandate of Congress counts for *nothing*. The Constitution counts for *nothing*. Law reduces to MacBeth's lament over a wasted life: "a tale told by an idiot, * * * signifying nothing".

MacBeth may, in fact, be right. The lower courts in this case did not shrink from accepting *sub silentio* such a conclusion. One hopes that this Court will do otherwise. The writ should be granted.

Respectfully submitted,

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[4] § 2, Fourth (emphasis supplied).